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No. 92-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF PETITION

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BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF PETITION

INTEREST OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES.

The National Council of Farmer Cooperatives (hereinafter referred to as the "National Council") is a nationwide association of cooperative businesses owned and controlled by farmers. Its membership includes nearly 100 major marketing and farm supply cooperatives, the banks of the Farm Credit System, and 31 State councils of farmer cooperatives. The National Council's members handle practically every type of agricultural commodity produced in the United States. They market these commodities domestically and around the world, and they furnish supplies and credit to their farmer members and patrons.

The National Council represents about 90% of the nearly 4,700 local farmer cooperatives throughout the nation, and those cooperatives have a combined membership of nearly 2,000,000 farmers.

The interest of the National Council in this vicarious liability criminal antitrust case against a farmer cooperative is to urge the Court to review the Fourth Circuit's decision on constitutional grounds of major importance to farmer cooperatives generally. The National Council respectfully submits the lower courts should have followed controlling decisions of this Court and dismissed the indictment under the Due Process Clause of the Fifth Amendment because of the government's extraordinarily lengthy,exceedingly prejudicial and wholly unjustified preindictment delay. In addition, both the district court and the court of appeals erred when they failed to follow other controlling decisions of this Court and allowed the

federal prosecutors unconstitutionally to suppress critically important impeachment and credibility evidence which, if produced in this vicarious liability case, could have dramatically changed the jury's verdict at the end of the trial. The National Council will demonstrate that, in imputed liability criminal cases of this nature, constitutional violations of that magnitude not only deprive a farmer cooperative of the ability fairly to defend itself against an indictment in the ordinary sense, but they also effectively strip the cooperative of exemptions from the antitrust laws enacted by Congress and the States specifically to protect farmer cooperatives against such liability.

The National Council's interest also extends to the Fourth Circuit's failure to recognize that the fine and related penalties imposed on the farmer cooperative in this vicarious liability case were likewise unconstitutional, grossly unfair, excessive and contrary to the "factors relating to imposition of fines" specified by Congress in the Criminal Fines Enforcement Act, 18 U.S.C. 3622. The district court fined the cooperative and its farmer members $1,100,000, notwithstanding they were clearly personally innocent of the unauthorized, relatively minor violation of the Sherman Act allegedly committed several years ago by an employee the cooperative discharged in 1986. As a result of its conviction in this case, the cooperative was also automatically suspended as a government contractor, and thus the cooperative lost another $10,000,000 in federal military sales. The cooperative and its members were thereupon subjected to a civil antitrust action filed by the Attorney General of Virginia in which the State of Virginia claimed an additional sum in excess of $20,000,000. The National Council respectfully submits that, at the very least, this travesty of justice should be remanded to the district court for resentencing.

SUMMARY OF ARGUMENT

1. *Unconstitutional Preindictment Delay*—This case is a classic example of unconstitutional preindictment delay. The indictment was actually barred by the applicable five-year statute of limitations. Thus, the Fourth Circuit erred by failing to dismiss the indictment for both unconstitutional preindictment delay and limitations. *United States v. Marion*, 404 U.S. 307 (1971). In the alternative, the indictment is still barred by unconstitutional preindictment delay because the delay of more than seven years was exceedingly prejudicial; it was *not* 'investigative delay'; and it was totally unjustified by the government. *Dickey v. Florida*, 398 U.S. 30 (1970); *United States v. Lovasco*, 431 U.S. 783 (1977).

2. *Unconstitutional Suppression Of Evidence By The Prosecutors*—Having subjected petitioner cooperative to unconstitutional delay, it was imperative for the prosecutors to disclose any *impeachment* or *credibility* evidence they possessed regarding their star witness, the cooperative's former employee for whose alleged crime the cooperative was vicariously indicted. They wilfully failed to do so and grossly misled the cooperative about the nature of his testimony. This suppression of critical evidence violated the cooperative's rights under the Fifth and Sixth Amendments. *Brady v. United States*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667, 675 (1985).

3. *Unconstitutional Sentencing Procedure and Fine*—The $1,100,000 fine imposed on the first offender cooperative, which must be paid by its individual farmer members, violates the Fifth and Eighth Amendments and the Criminal Fines Enforcement Act, 18 U.S.C. 3622. *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *United States v. Harvey*, 885 F.2d 181 (4th Cir. 1989).

ARGUMENT

I

THIS VICARIOUS LIABILITY CRIMINAL CASE SHOULD BE REVIEWED, REVERSED AND DISMISSED FOR UNCONSTITUTIONAL PREINDICTMENT DELAY

As the petition for a writ of certiorari demonstrates, no rule of criminal antitrust law is more Draconian or oppressive than the "vicarious liability rule". That rule imposes criminal liability on a corporate employer for a lower level employee's violation of the Sherman Act, even in cases where the employee acted entirely without the corporation's knowledge, authorization or approval, and contrary to the employer's antitrust policies and instructions. *United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983), *cert. denied*, 464 U.S. 956 (1983); *United States v. Hilton Hotels Corporation*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973). Consequently, it is exceedingly difficult for any corporation successfully to defend itself in any vicarious liability case—even when the employee, who allegedly violated the Sherman Act, is still employed and available for pretrial preparation and as a witness for the corporation at trial.

In the case at bar, however, the incorporated farmer cooperative's predicament was practically impossible. The lower level employee, who allegedly violated the Sherman Act in 1984, was discharged for other reasons in 1986. The cooperative was not indicted for the employee's alleged crime until 1991, i.e. more than seven years after the alleged Sherman Act violation took place. Because of his dismissal from employment, the employee was disgruntled and hostile to the cooperative. In fact, a Department of Justice memorandum, not unearthed until after the trial in this case, establishes that the employee was determined to get even with the cooperative for the discharge, and that accordingly he worked closely with federal prosecutors to obtain the cooperative's indictment and

conviction (Pet.App. 63a-65a). Moreover, when the employee was dismissed in 1986, he took all his personal work papers with him. As a result, the cooperative was essentially defenseless when it was indicted in 1991 for his alleged Sherman Act bid-rigging violation. Both the employee who committed the crime vicariously charged against the cooperative was gone and working with the prosecutors, and all of the employee's work papers, bid documents, bid computations, memoranda and correspondence were likewise missing. Obviously, the employee's critically important personal bid records and computations could not be obtained or duplicated from any other source, as suggested by the Fourth Circuit.

As further demonstrated in the petition for certiorari, the government thereupon proceeded to make matters even more impossible for the cooperative in 1991. After waiting more than seven years to indict the cooperative, it successfully opposed or precluded each and every pretrial effort the cooperative made to obtain information or discovery from its former employee regarding his alleged Sherman Act violation.

The National Council thus respectfully submits that this case is a classic example of *unconstitutional preindictment delay*. The delay involved is extraordinary. The indictment was filed more than seven years after the alleged Sherman Act offense took place in 1984, and more than five years after the cooperative removed the disgruntled employee from his position. See *Dickey v. Florida*, 398 U.S. 30 (1970). "Stale claims have never been favored by the law, and far less in criminal cases". *Dickey, supra*, at p. 37.

In fact, as the petition for certiorari argues, the indictment was actually barred by the applicable five-year statute of limitations, 18 U.S.C. 3282. See *United States v. Marion*, 404 U.S. 307, 322-23 (1971). This Court, of course, has repeatedly emphasized that "criminal statutes of limitation are to be *liberally interpreted* in favor of

repose." *United States v. Marion, supra,* at p. 323, n.14; *United States v. Scharton,* 285 U.S. 518 (1932); and that the applicable period of limitations (five years) specified "a limit beyond which there is *an irrebuttable presumption* that a defendant's right to a fair trial would be prejudiced." See *Marion,* at pp. 322-23. In this regard, three justices of this Court wrote in their concurring opinion in *Marion,* at p. 331:

> "The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his."

Basically, therefore, the National Council urges this Court to hold that the Fourth Circuit erred by failing to dismiss the indictment for *both unconstitutional preindictment delay and under the five-year statute of limitations.* As petitioner herein has established, the government failed to prove that the indictment was not barred by limitations, and the district court did not instruct the jury in this regard. See *Grunewald v. United States,* 353 U.S. 391, 396-97, 413-15 (1957).

Assuming *arguendo* that, contrary to *Marion, supra,* this Court opts to construe the five-year statute of limitations "restrictively" (as did the Fourth Circuit) instead of *"liberally. . .in favor of repose"*, the National Council nevertheless still believes the indictment must be dismissed for unconstitutional preindictment delay. In *United States v. Lovasco,* 431 U.S. 783, 790 (1977), this Court ruled that, in cases *where the period of preindictment delay is shorter*

than the applicable statute of limitations period, "The due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." In this case, actual "*prejudice to the accused*" was established beyond a shadow of a doubt, but the prosecutors offered *no* alleged "*reasons for the delay*" until they filed their brief in the Fourth Circuit. Those alleged "reasons" were totally disingenuous. In other words, the prosecutors followed the same procedure here as the prosecutors followed in *Lovasco*, where Mr. Justice Marshall complained for this Court: "[T]here is, unfortunately, no evidence concerning the reasons for the delay in the record. . ."(See 431 U.S. 796). Mr. Justice Stevens thereupon stated in his dissenting opinion, at 431 U.S. 799:

> "This finding of a continuing investigation, which forms the foundation of the majority opinion, comes from statements of counsel made during the appellate process. As we have said of other unsworn statements which were not part of the record and therefore could not have been considered by the trial court: "Manifestly, [such statements] cannot be properly considered by us in the disposition of [a] case. . . ."[1]

The National Council respectfully submits that, under these circumstances, the indictment in this case should also be dismissed because of the government's failure to present evidence in the record to justify its years of preindictment delay. See *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 157-58, n.16. At the very least, this case should be remanded to the district court with a direction that a hearing be held to determine why the government failed to file the indictment for so many years. This relief

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[1] In *Lovasco*, the indictment was dismissed by the district court after a hearing, for 18 months of unexplained, unjustified preindictment delay. The Court of Appeals affirmed because it agreed the delay was "unjustified, unnecessary and unreasonable." (see 431 U.S. 785-87).

is plainly mandated by the magnitude of "*actual prejudice*" suffered by the farmer cooperative as a result of the government's unjustified, unnecessary, unreasonable delay. That prejudice, supported by evidence in the record, is as follows:

1. In a vicarious liability case of this nature, wherein the farmer cooperative was indicted in 1991 for an unauthorized violation of the Sherman Act allegedly committed by a former employee in 1984 prior to his discharge in 1986, the cooperative's ability to defend itself depended almost exclusively on that employee's availability to assist in preparation for trial and to testify as a witness for the cooperative at trial. After all, the cooperative was indicted for a crime allegedly committed by that employee on his own motion, without the knowledge or authorization of the cooperative. But the cooperative's ability to defend itself in 1991 was fatally prejudiced during the lengthy period of preindictment delay when he thereupon became exceedingly disgruntled and hostile to the cooperative. He unfairly and surreptitiously joined forces with the prosecutors, obtained personal immunity from prosecution, and became the key witness for the government in its belated attempt to indict and convict the cooperative for that employee's alleged bid-rigging offense.

In *Dickey v. Florida, supra*, this Court ruled that a defendant was unconstitutionally prejudiced by an 8-year indictment delay because "In the interval two witnesses died and another potential witness is alleged to have become unavailable" (398 U.S. 36). Here, the cooperative's indispensable witness became irrevocably hostile and totally unavailable to the cooperative in its defense against the indictment. He actually became the government's "secret weapon" against the cooperative in this criminal case. His surprise appearance at the trial as the star witness for the government clearly did not aid the cooperative's

defense, as the Fourth Circuit suggested. On the contrary, it assured the cooperative's unconstitutional conviction.[2]

2. The severe prejudice inflicted by the government's preindictment delay on the cooperative's ability to defend itself was exacerbated by other actions the government took to deny the cooperative access to the hostile employee and to his testimony regarding the alleged Sherman Act violation. The prosecutors prevented the employee from testifying before the grand jury. They quashed the cooperative's motion to take his deposition. They intentionally misled the cooperative by disclosing that, in 1987, the employee denied any and all knowledge of school bid-rigging, and thus they represented he probably would not be called as a witness for the government at trial.

3. In addition, the cooperative was further prejudiced when, during the years of preindictment delay, the hostile employee departed with all his personal bid papers, as well as correspondence and memoranda regarding his activities. Without him and without his records, the cooperative had no means of defense against an indictment based on that employee's alleged unauthorized violation of the Sherman Act. In *Dickey v. Florida, supra*, "records of possible relevance" were likewise lost (398 U.S. 36). In *United States v. Richburg*, 478 F.Supp. 535, 539-546 (M.D. Tenn. 1979), records and notes which could have assisted the defendants in cross-examination of government witnesses were lost during 32 months of preindictment delay. Thus, the indictment was dismissed as to those defendants. See also: *United States v. Sample*, 565 F.Supp. 1166 (E.D. Va. 1983).

4. Finally, the cooperative in this case was even more severely prejudiced by preindictment delay when it was

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[2] See also *Howell v. Barker*, 904 F.2d 889, 891 (4th Cir. 1990), *cert. denied* 111 S.Ct. 590 (1990) where 27 months of preindictment delay was ruled unconstitutional because, during the period of delay, defendant's alibi witness became unavailable.

unable to interview or depose the discharged, hostile employee to determine whether his alleged violation of the Sherman Act, now charged against the cooperative, was in any respect exempt from the antitrust laws under several statutes enacted by Congress and the States to shield farmer cooperatives from antitrust liability. See the Capper-Volstead Act, 7 U.S.C. 291; the Clayton Act, § 6, 15 U.S.C. 17; the Cooperative Marketing Act, 7 U.S.C. 455; the Agricultural Fair Practices Act, 7 U.S.C. 2301 *et seq.*; and Code of Virginia, §§ 59.1-9.4(2); 3.1-461.

Under the Capper-Volstead Act and the Clayton Act, *supra*, two or more farmer cooperatives may lawfully enter into non-predatory marketing agreements and combinations, and those agreements are immune from prosecution under the Sherman Act. See *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied* 454 U.S. 818 (1981); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F.Supp. 984 (N.D.Cal. 1976), affd. 580 F.2d 369 (9th Cir. 1978), *cert. denied* 439 U.S. 1090 (1979); *United States v. Maryland Cooperative Milk Producers, Inc.*, 145 F.Supp. 151 (D.C. D.C. 1956).

Virginia, in turn, enacted the Virginia Milk Commission law which pervasively regulates milk marketing and pricing in southeastern Virginia. Code of Virginia,§ 3.1-425. That statute provides, at Code of Virginia, § 3.1-461:

> "Marketing Agreements Not Deemed Monopolistic Or In Restraint Of Trade
>
> "The making of marketing agreements between producers' cooperative marketing associations [the cooperative in this case] and distributors [Pet in this case]. . .shall not be deemed a combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices. . ., nor shall the marketing contract or agreements between the association [the cooperative] and the

> distributors [Pet]. . .be considered illegal or in restraint of trade."

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court ruled that marketing agreements and marketing combinations made in accordance with a raisin marketing program established by California under the California Agricultural Prorate Act are immune from scrutiny under the Sherman Act because Congress did not intend that actions taken under or authorized by state statutes be prosecuted as violations of the antitrust laws. Chief Justice Stone, writing for this Court, stated at 317 U.S. 350, 51:

> "We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain. . .activities directed by [a State] legislature."[3]

In this case, however, the cooperative was unfairly precluded by the discharged employee's complete inaccessibility from even determining whether it had a viable "*state action*" defense based on the Virginia statute. Consequently, when the cooperative moved to dismiss the Sherman Act charge under the "state action" doctrine of *Parker v. Brown*, *supra*, the district judge refused even to consider the motion, stating: "That's a red herring" (JA 671). The Fourth Circuit, in turn, rejected the argument in a mere footnote to its decision (Pet. App. 29a (n.11)).

Furthermore, as stated above, there is not a scintilla of evidence in the record to support the government's belated claim that its preindictment delay of more than seven years was "*investigative delay*". See *Lovasco, supra.* Here, the delay was "*inexplicable delay.*"

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[3] See also: *Flav-O-Rich, Inc. v. North Carolina Milk Commission*, 593 F.Supp. 13 (E.D. N.C. 1983); *Wainwright v. National Dairy Products Corp.*, 304 F.Supp. 567 (N.D. Ga. 1969).

Based on the foregoing, the National Council urges this Court to review this case and dismiss the indictment for plain unconstitutional preindictment delay.

II

THIS VICARIOUS LIABILITY CRIMINAL CASE SHOULD ALSO BE REVIEWED AND REVERSED BECAUSE THE PROSECUTORS WILFULLY SUPPRESSED CRITICALLY IMPORTANT IMPEACHMENT AND CREDIBILITY EVIDENCE.

As stated above, in a vicarious liability criminal case of this nature, the cooperative's ability effectively to defend itself depends almost entirely on the availability of the employee who allegedly committed the unauthorized crime, during both the cooperative's preparation for trial and as a witness for the cooperative at trial. Here, that availability was foreclosed by unconstitutional preindictment delay, and the cooperative was unable to obtain any information from the employee prior to trial due to the prosecutors' opposition.

Under these circumstances, it was obviously imperative for the prosecutors to disclose to the cooperative any *impeachment* or *credibility* evidence they possessed regarding the former employee for whose alleged crime the cooperative was indicted. They failed to do so. Instead, they wilfully misled the cooperative by releasing only a tiny piece of information which depicted the former employee swearing to the prosecutors (and numerous federal investigators) in 1987 that he had no knowledge of any kind regarding school milk contract bid-rigging (Pet.App. 66a). Thus, *throughout the trial*, the prosecutors wilfully suppressed the following vitally important *impeachment* and *credibility* evidence in violation of the cooperative's right to due process and a fair trial under the Fifth and Sixth Amendments:

1. Evidence that the former employee had an important stake in the outcome of this litigation. The former employee had a burning desire to get even with the cooperative (as well as the employee who replaced him in 1986) by seeking their indictment and conviction for one or more alleged crimes he sought to create (Pet.App.63-65a).

2. Evidence that shortly after his discharge, the former employee voluntarily came to the prosecutors and proffered a series of criminal charges against the cooperative, all of which were investigated by the prosecutors before a grand jury and found to be wholly unsupportable and unsustainable (Pet.App. 63-65a).

3. Evidence to establish what caused the former employee diametrically to change his 1987 testimony when he testified for the government in 1991. In 1987, the former employee testified he had no knowledge of any school contract bid-rigging. However, at trial in 1991 he testified he personally engaged in school contract bid-rigging in 1984, and thus he harnessed the cooperative with vicarious liability for his own alleged offense.[4]

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that "suppression by the prosecution of evidence favorable to the accused upon request. . .violates due process,. . .irrespective of the good faith or bad faith of the prosecution." In *Giglio v. United States*, 405 U.S. 150 (1972), this Court ruled that in criminal prosecutions where the government's case depends heavily on the testimony of a particular witness, that witness' credibility or reliability are vitally important. Thus, this Court held that, in such cases, it is incumbent on prosecutors to disclose any material *impeachment* or *credibility* evidence in their pos-

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[4] According to the petition for certiorari, this evidence resides in the prosecutors' notes covering their 90 hours of interrogation of the employee on 13 different occasions in 1991. During that period, the employee received numerous grants of personal immunity from prosecution.

session. In sum and substance, the prosecutors must disclose all evidence in their possession which, if withheld, would deprive the accused of a fair trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985). Indeed, the prosecutors have a "duty to produce" all evidence which might be supportive of the accused's claim of innocence. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

The National Council submits that the Fourth Circuit erred by holding, contrary to the Department of Justice's internal memorandum released after the cooperative's conviction, that "this is [*not*] a case in which the key government witness had a personal stake in the outcome of the litigation" (Pet.App. 18a). Here, the government's star witness had an overwhelming interest in the outcome. He was determined to get even with the cooperative for his 1986 discharge by obtaining the cooperative's vicarious conviction in this case for a crime he (the employee) allegedly committed. See *Giglio*, *supra*, at 405 U.S. 154-55. When the prosecutors withheld all the other impeachment and credibility evidence described above, they deprived the cooperative of evidence "so clearly supportive of a claim of innocence" that the prosecutors had a plain "*duty*" to produce it. *United States v. Agurs*, *supra*, at 427 U.S. 107.

On this ground, too, the National Council urges this Court to review this case and reverse the Fourth Circuit's erroneous decision which clearly conflicts with several important decisions of this Court.

III

THIS VICARIOUS LIABILITY CASE SHOULD LIKEWISE BE REVIEWED TO DETERMINE WHETHER THE SENTENCING AND FINE WERE UNCONSTITUTIONAL AND UNLAWFUL.

The sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Defendants clearly

have a legitimate interest in the character of the procedure which leads to the imposition of sentence. *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968). Due process is flexible, and thus it calls for such procedural protections as the particular situation demands. *Gardner*, *supra*, at 430 U.S. 358, n.9. In addition, of course, excessive fines are prohibited by the Eighth Amendment.

Moreover, sentencing in this case was governed by the Criminal Fines Enforcement Act, 18 U.S.C. § 3622 entitled "Factors Relating To Imposition of Fines". That statute enumerates several factors district courts must consider when imposing sentences. An excessive fine can be reversed under the abuse of discretion standard. See *United States v. Harvey*, 885 F.2d 181 (4th Cir. 1989).

Applying these principles to the case at bar, the National Council submits that, for the following reasons, the $1,100,000 fine imposed on the cooperative is grossly excessive, constitutionally objectionable and violative of the letter and spirit of the statutory "*fine factors*" specified in 18 U.S.C. 3622:

1. The $1,000,000 portion of the fine imposed on the cooperative for the Sherman Act violation was the *maximum* fine then imposable on *any* "*corporation*" under that statute (15 U.S.C. 1). But, the court failed to recognize that, while legally the cooperative is a "corporation", under cooperative fiscal and funding procedures, the fine is ultimately assessed against and paid by the *individual farmer members* of the cooperative. The maximum fine then imposable on *individuals* under the Sherman Act was $100,000.

2. The additional $100,000 fine levied by the court under the two extremely technical mail fraud counts of the indictment—$50,000 on each count—was likewise grossly excessive. Under the Mail Fraud Statute, 18 U.S.C. 1341, the maximum fine specified was "not more than $1,000." Having already imposed the *maximum* $1,000,000 fine on

the cooperative under the Sherman Act, the court nevertheless abused its discretion by ignoring the maximum statutory fine. Instead it utilized the discretionary "Alternative Fine" provisions of 18 U.S.C. 3623 to saddle the farmer members of defendant cooperative with a staggering fine *50 times greater than the maximum fine specified in the Mail Fraud statute itself.*

3. The *"Factors Relating To Imposition Of Fines"* prescribed by Congress in 18 U.S.C. 3622 plainly do *not* support or justify the court's excessive, abusive actions in this case. *First*, the offense charged against the cooperative is *"vicarious"* only—the cooperative was convicted of crimes allegedly committed by a former employee without the cooperative's knowledge, authorization or direction. *Second*, the cooperative is a farmers' organization *which has never been convicted of any other criminal offense.* In other words, this is its *first* offense. *Third*, any fine in this case will ultimately be charged against and paid by the cooperative's individual farmer members. *Fourth*, the excessive, bloated fines imposed by the court will thus place a heavy burden on each of the cooperative's individual members. Those members are *totally innocent* of the crimes allegedly committed by the former employee, and *many of them were not even members of the cooperative when the crimes were allegedly committed.*

Fifth, the government offered no evidence at the trial to support a contention that any Virginia school or any Virginia school children or their parents suffered any pecuniary loss as a result of the alleged offense. Indeed, the government's own witnesses insisted the alleged Sherman Act violation did not result in any *price increases* or *increased profits.* In fact, the evidence established that, throughout the indictment period, the Virginia schools resold the cooperative's milk with an approximately 100% mark-up. *Sixth*, nevertheless the cooperative's farmer members were compelled (through the aforesaid treble damage antitrust action brought by the State of Virginia)

to pay $1,050,000 in "restitution" to Virginia schools, *in addition* to the $1,100,000 fine imposed on the cooperative by the court in this criminal case.

Seventh, the government failed to prove there are any "illegally obtained gains" to be recovered from the cooperative or its members in this case. *Eighth*, the expense of the fine cannot be passed on to customers. Rather, as stated above, it must be paid by the individual farmer members of the cooperative. And, *ninth*, in response to 18 U.S.C. 3622's last "fine factor", the cooperative discharged the employee who allegedly committed the Sherman Act violation in this case more than five years before it was indicted by the government.

Based on this record, the National Council respectfully submits that the $1,100,000 fine imposed on the farmer cooperative in this case was excessive, unfairly abusive and unconstitutional under the Fifth and Eighth Amendments.

* * *

Any doubt about the wholly unjust, unconstitutional nature of the truly excessive fine imposed on the cooperative in this case vanishes when two additional factors are brought to light. First, as a result of the conviction in this case, the cooperative was automatically suspended as a government contractor by the Defense Logistics Agency, and it was thus forced to lose $10,000,000 in federal military installation sales before it was recently reinstated.

Finally, when the cooperative appeared before the district court for sentencing, the court insisted on fining the cooperative for damages allegedly sustained by the City of Norfolk schools. However, bids and sales to Norfolk were not covered by either the indictment or the government's proof at trial. The Fourth Circuit erroneously sustained this punitive procedure, which clearly violates the Due Process Clause of the Fifth Amendment, stating (Pet.App. 36a):

> ". . .[W]hether or not such evidence was admitted at trial, a court can and should consider the total amount of pecuniary loss to victims of a crime when determining an appropriate sentence. . . ."

But there is absolutely nothing in the indictment or the record in this case to suggest that Norfolk or its schools were, in any respect, victimized by the cooperative. And, as the largest city in southeastern Virginia, Norfolk's improper involvement in the sentencing procedure contributed disproportionately to the excessive fines imposed by the court.

CONCLUSION

The petition for a writ of certiorari should be granted. This case should be reviewed on constitutional grounds. The decision of the Fourth Circuit should be reversed, and the indictment dismissed or a new trial granted. At the very least, the case should be remanded for resentencing.

Respectfully submitted,

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